# Lim Nyook Yin v Ultratech Sdn Bhd & Anor

HIGH COURT (TAIPING) — CIVIL SUIT NO 22-43-94(T)
ABDUL MALIK ISHAK J
12 OCTOBER 1994

***Civil Procedure*** *— Injunction — Ex parte interim injunction — Life span of two weeks — Whether court has power to set return date for inter partes hearing before expiry of two weeks — Whether court can extend injunction — Rules of the High Court 1980 O 29 r 1(2B) & O 29 r 4*

The plaintiff entered into an agreement with the first defendant, who held a timber concession, to buy all the timber logs extracted from a designated area. Under the agreement, the plaintiff advanced RM432,000 to the first defendant to enable the latter to commence extraction of the timber. Subsequently, however, the first defendant entered into another agreement with the second defendant for the sale of all the logs extracted from the area. The plaintiff applied for and was granted an ex parte interim injunction on 8 September 1994, with a return date on 21 September 1994, restraining both defendants from removing timber logs from the area. The first defendant raised a preliminary objection that the life-span of an ex parte interim injunction is two weeks and that there is no provision under O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC') for a return date to be given before the expiry of two weeks. The first defendant also submitted that O 29 r 1(2B) of the RHC is mandatory and, should the plaintiff wish the matter to be heard inter partes, the ex parte application for the interim injunction should be served on the defendants. The plaintiff, on the other hand, argued that the words 'unless sooner revoked or set aside' appearing in O 29 r 1(2B) of the RHC, reflect the need for a return date to be given to enable the other side to come to court and argue it out.

**Held**, rejecting the preliminary objection:

Time is mandatorily set out in O 29 r 1(2B) of the RHC and the court has no power to extend it. Thus, an interim injunction granted ex parte would lapse after two weeks in the absence of any application to revoke it or set it aside.The words 'unless sooner revoked or set aside' in O 29 r 1(2B) of the RHC by itself gave the court power to set a return date for an inter partes hearing. This is the best way for the defendants to revoke or set aside the ex parte interim injunction before the expiry of two weeks. At the inter partes hearing, the ex parte interim injunction may be extended under O 92 r 4 until disposal of the suit.

**Obiter:**

If the plaintiff knows that the defendants are represented by counsel, then the defendants' counsel should be notified of the ex parte

application unless secrecy is essential. If the defendants are informed or hear of the application, they have an inherent right to be present but are entitled to remain silent and take no part in the proceedings. The defendants may take an active part in the ex parte hearing, provided they were informed earlier, and it will then become an 'opposed ex parte application'. If the ex parte application is granted in their presence, they may immediately move, ex parte, to discharge or vary the injunction.

**[Bahasa Malaysia summary**

Plaintif telah mengikat suatu perjanjian dengan defendan pertama, yang memegang satu konsesi balak, untuk membeli semua kayu balak yang dikeluarkan dari kawasan yang tertentu. Di bawah perjanjian itu, plaintif telah membuat bayaran pendahuluan sebanyak RM432,000 kepada defendan pertama untuk membolehkan beliau bermula mengeluarkan kayu balak tersebut. Walau bagaimanapun, seterusnya, defendan pertama telah mengikat satu perjanjian yang lain dengan defendan kedua untuk penjualan semua kayu balak yang dikeluarkan dari kawasan itu. Plaintif telah memohon dan mendapatkan satu injunksi interim ex parte pada 8 September 1994 dengan tarikh kembalian pada 21 September 1994 untuk menyekat kedua-dua defendan daripada mengalihkan kayu balak dari kawasan itu. Defendan pertama telah membuat bantahan permulaan bahawa tempoh hidup sesuatu injunksi interim ex parte adalah dua minggu dan tidak terdapat peruntukan di bawah A 29 k 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu tarikh kembalian diberikan sebelum tamatnya tempoh dua minggu tersebut. Defendan pertama juga menghujahkan bahawa A 29 k 1(2B) KMT adalah satu peruntukan mandatori dan, sekiranya plaintif ingin perkara ini didengar inter partes, permohonan ex parte untuk injunksi interim itu perlu diserahkan ke atas defendan. Plaintif pula menghujahkan bahawa perkataan 'melainkan jika dibatalkan atau diketepikan terlebih dahulu' yang terkandung dalam A 29 k 1(2B) KMT membayangkan satu tarikh kembalian perlu diberikan supaya pihak yang lagi satu dapat hadir di makamah untuk mengemukakan alasan menentang perkara itu.

**Diputuskan**, menolak bantahan permulaan itu:

Masa adalah di nyatakan secara mandatori dalam A 29 k 1(2B) KMT dan mahkamah tidak mempunyai kuasa untuk melanjutkannya. Dengan itu, sesuatu injunksi interim yang dibenarkan ex parte akan luput selepas dua minggu sekiranya tidak ada permohonan untuk membatalkan atau mengetepikannya. Perkataan 'melainkan jika dibatalkan atau diketepikan terlebih dahulu' di dalam A 29 k 1(2B) KMT, dengan sendiri memberikan kuasa kepada mahkamah untuk memberi satu tarikh kembalian untuk pembicaraan inter partes. Ini adalah cara yang paling sesuai bagi defendan membatalkan atau

mengetepikan injunksi interim ex parte itu sebelum luputnya tempoh dua minggu tersebut. Pada pembicaraan inter partes tersebut, injunksi interim ex parte itu boleh dilanjutkan lagi di bawah A 92 k 4 sehingga selesainya pembicaraan tindakan itu.

**Obiter**:

Sekiranya plaintif tahu bahawa defendan diwakili oleh peguam, peguam defendan harus diberitahu tentang permohonan ex parte tersebut kecuali ada keperluan untuk merahsiakannya. Sekiranya defendan dengar atau dapat tahu akan permohonan itu, mereka mempunyai hak sedia ada untuk menghadiri pembicaraan tersebut dan berhak berdiam diri dan tidak mengambil bahagian dalam prosiding tersebut. Defendan boleh mengambil bahagian dalam pembicaraan ex parte tersebut jikalau mereka telah diberitahu terlebih dahulu, dan pembicaraan itu akan menjadi satu 'permohonan ex parte yang ditentang'. Jika injunksi ex parte itu dibenarkan di hadapan mereka, mereka boleh memohon, secara ex parte, untuk membatalkan atau mengubahkan injunksi itu.

**Notes**

For cases on ex parte interim injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1440, 1463–1466.

**Cases referred to**

*Bates v Lord Hailsham of St Marylebone* [1972] 3 All ER 1019; [1972] 1 WLR 1373 (folld)

*Castle Fitness Consultancy Pte Ltd v Manz* [1990] 1 MLJ 141 (refd)

*Christies Sands Pty Ltd v City of Tea Tree Gully* (1975) 11 SASR 255 (refd)

*Coutts v Commonwealth of Australia* (1985) 157 CLR 91 (refd)

*Hatton v Beaumont* [1977] 2 NSWLR 211 (refd)

*Hinds, Re Penboss, ex p* [1972] 2 NSWLR 542 (refd)

*Metalock Marine Construction Pte Ltd v Kelvinside Ltd* [1985] 2 MLJ 9 (folld)

*Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 3 All ER 384; [1972] 1 WLR 1213 (refd)

*Sheffield City Council v Graingers Wines Ltd* [1978] 2 All ER 70; [1977] 1 WLR 1119 (refd)

*Shobri bin Hasan v RS Ramalingam* [1993] 1 MLJ 263 (refd)

*Taite v Hurle* (1967) 13 LGRA 412 (refd)

*Tan Kim Seng v Tan Kim San* [1994] 3 CLJ 671 (folld)

*Transport Amalgamated Pty Ltd v AAA Transport Services Pty Ltd* [1975] WAR 101 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 29 r 1(2B), O 92 r 4

A *A Selvanathan* (*Kean Chye & Sivalingam*) for the plaintiff.
*S Guna* (*Nazri Aziz & Wong*) for the first defendant.
The second defendant in person.

**Abdul Malik Ishak J**: Timber concessions were granted to the first defendant in an area known as Dalam Air Tasik Temenggor, Daerah Hulu
B Perak ('the designated area') and, being impecunious, the first defendant entered into an agreement with the plaintiff on 19 February 1994, wherein the latter agreed to buy all the timber logs extracted from the designated area. Under the agreement, the plaintiff advanced RM432,000 to the first defendant to enable the latter to commence extraction of the timber logs
C at the designated area. The money advanced by the plaintiff came from Rencovest Sdn Bhd of which the plaintiff was the managing director and the majority shareholder. On the sly, the cunning first defendant entered into another agreement dated 8 August 1994 with the second defendant for the sale of all the timber logs extracted from the designated area. As a matter of urgency and feeling threatened, the plaintiff applied for an
D ex parte interim injunction. This was a perfectly legitimate course of action as Megarry J said in *Bates v Lord Hailsham of St Marylebone* [1972] 3 All ER 1019; [1972] 1 WLR 1373, 'Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion.' In due course, on 8 September 1994, I granted an ex parte
E interim injunction restraining both the defendants from removing timber logs extracted from the designated area and, at the instance of the plaintiff's counsel, the return date was accordingly fixed on 21 September 1994.

Order 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC') which came into effect on 2 November 1993 vide PU(A) 364/93 states as
F follows:

> Unless sooner revoked or set aside, an interim injunction obtained on an ex-parte application shall automatically lapse at the end of two weeks from the date on which it is granted.

Miss S Guna submits on behalf of the first defendant and raises a preliminary
G objection to the effect that there is no provision under O 29 r 1(2B) of the RHC for the return date to be given before the expiry of the two weeks and if the plaintiff wants the matter to be heard inter partes, encl 1A (referring to the ex parte application for an interim injunction) should be served on the defendants. She submits, forcefully, that the life-span of an ex parte interim injunction is only two weeks and, since there is no provision for an
H extension of the life span of an ex parte interim injunction, it follows, therefore, that O 29 r 1(2B) of the RHC is a mandatory provision.

On the other side of the fence, Mr A Selvanathan submits on behalf of the plaintiff that the words appearing in O 29 r 1(2B) of the RHC, especially the words 'unless sooner revoked or set aside', reflect the need
I for a return date to be given so as to enable the other side to come to court and argue it out.

The rules committee in its wisdom makes O 29 r 1(2B) of the RHC mandatory, giving it statutory flavour (*Shobri bin Hasan v RS Ramalingam*

[1993] 1 MLJ 263), and the language employed therein lays down a procedure to be followed, especially in regard to time. Provisions with respect to time are always mandatory unless the court is given a power of extending the relevant time limit (*Transport Amalgamated Pty Ltd v AAA Transport Services Pty Ltd* [1975] WAR 101 at pp 102–103 (WA, SC) and *Christies Sands Pty Ltd v City of Tea Tree Gully* (1975) 11 SASR 255 at pp 262–263 (SA, SC). Being procedural in nature, they are said to be usually, or prima facie, mandatory in character. It is said also that a mandatory requirement has to be obeyed exactly whereas a directory requirement is to be obeyed substantially (see *ex p Hinds, Re Penboss* [1972] 2 NSWLR 542 at p 552). It goes without saying, and it is frequently said, that to determine whether the words employed are to be treated as mandatory or directory one must not forget the advice of Lord Denning MR in *Sheffield City Council v Graingers Wines Ltd* [1978] 2 All ER 70 at p 72; [1977] 1 WLR 1119 at p 1122 to the effect that 'it is always a matter of impression'.

The word 'shall' appearing in O 29 r 1(2B) of the RHC is, of course, prima facie mandatory (*Coutts v Commonwealth of Australia* (1985) 157 CLR 91 at pp 111–112) but the problem is this: the mere use of the word 'shall' is not in itself enough to resolve the question (*Hatton v Beaumont* [1977] 2 NSWLR 211 at p 222). There is an authority for the proposition that a provision containing the word 'shall' has been held not to be mandatory (*Taite v Hurle* (1967) 13 LGRA 412 at p 413 (Tas, SC)).

In my judgment, time is mandatorily set out in O 29 r 1(2B) of the RHC and the court has no power to extend time. Thus, an interim injunction granted ex parte would lapse after two weeks in the absence of any application to revoke it or to set it aside (*Tan Kim Seng v Tan Kim San* [1994] 3 CLJ 671). It is quite obvious that O 29 r 1(2B) of the RHC is inserted to curtail the life-span of an ex parte interim injunction. The plaintiff, in this case, was not obliged to inform the defendants of the ex parte application that came up for hearing on 8 September 1994, but he could have if he wanted to. There is no evidence here, but if the plaintiff knows that the defendants are represented by counsel then the defendants' counsel should be notified of the ex parte application unless secrecy is essential (*Castle Fitness Consultancy Pte Ltd v Manz* [1990] 1 MLJ 141). Now, if the defendants are informed by the plaintiff or if they learn of the ex parte application themselves, they may choose to attend the hearing in chambers and, in this context, the defendants have an inherent right to be present even though it is an ex parte hearing. If the defendants attend, they are entitled to remain silent and take no part in the proceedings. Consequently, if the ex parte interim injunction is granted in their presence, they may immediately move, ex parte, to discharge or vary that injunction. The defendants may also take an active part in the ex parte hearing of the plaintiff's application on 8 September 1994, instead of remaining silent, provided they were informed earlier and, if this were to happen, the hearing will become an 'opposed ex parte application' (*Castle Fitness Consultancy Pte Ltd v Manz* and *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* [1972] 3 All ER 384; [1972] 1 WLR 1213).

A The proposition that Mr A Selvanathan has no right to apply for a return date whilst making an application for an ex parte interim injunction under O 29 r 1(2B) of the RHC and, consequently, that the court has no power to fix a return date, is entirely without merit. The words, as suggested by Mr A Selvanathan appearing in O 29 r 1(2B) of the RHC, especially the expression 'unless sooner revoked or set aside' would, by itself, give the power to the court to set a return date for an inter partes hearing. This is the best way for the defendants to revoke or set aside the ex parte interim injunction before the expiry of two weeks. Prior to the insertion of r 1(2B) in O 29 of the RHC (vide PU (A) 364/93, 2 November 1993), the practice was either to grant an ex parte interim injunction without giving the return date or to grant an ex parte interim injunction with a return date. Put in another way, an interim injunction may be granted ex parte until the return date for an inter partes hearing (see *Metalock Marine Construction Pte Ltd v Kelvinside Ltd* [1985] 2 MLJ 9 where it was stated that without a return date, the interim injunction that was granted does not comply with the usual form of an ex parte interim injunction and would appear to be defective). Alternatively, a judge may refuse to grant relief during the ex parte application and direct that the matter be dealt with inter partes. Now, with the insertion of r 1(2B) to O 29 of the RHC, the rules committee must have intended that all ex parte interim injunctions be valid for two weeks and return dates be given forthwith, preferably before the expiry of the two weeks to enable the matter to be argued fully. It must also be pointed out that in the inter partes hearing, the ex parte interim injunction may be further extended inter partes until the disposal of the main suit. That the court has such an inherent power to make such an order is beyond dispute (see O 92 r 4 of the RHC).

For the foregoing reasons, I ruled that there is no bar under the inherent power of the court to order a return date in an application under O 29 r 1(2B) of the RHC as this is the best possible way to resolve the ex parte interim injunction. If the return date is not given, the opposing party would not be in a position to revoke or set aside the ex parte interim injunction. Accordingly, I have no option but to reject the preliminary objections forthwith.

In the meantime, I am told by the parties that the matter has been amicably settled and the plaintiff is in the process of withdrawing the civil suit, and both parties craved leave for the matter to be struck out without any order as to costs, and an order to that effect was accordingly made by me. A happy ending to an unhappy episode.

*Order accordingly.*

Reported by Sarojah Arianayagam